90-1026

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October, 1990 term

Norman R. Evonuk
v.
The State of Oregon

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Norman R. Evonuk's
Petition for Writ of Certiorari

Norman R. Evonuk
34377 Seavey Loop Road
Eugene, OR 97405
Phone: 503-746-3982

Petitioner Pro Se

Question Presented for Review

Whether the Eleventh Amendment to the United States Constitution bars a suit for a judgment declaring a state statute unconstitutional when the suit is filed by a resident of that state.

List of Parties

The parties to this case are Norman R. Evonuk and the State of Oregon.

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Previous Opinions

On November 29, 1989, the United States District Court for the District of Oregon entered its "Findings and Recommendation," recommending dismissal of Petitioner's suit. By order of December 27, 1989, that same court then ordered the dismissal.

Appeal was had to the Ninth Circuit Court of Appeals. That court, by way of an opinion filed November 26, 1990, affirmed the dismissal.

Basis for Jurisdiction

The judgment of the Ninth Circuit was entered November 26, 1990. Jurisdiction is proper pursuant to 28 U.S.C. § 1254.

Relevant Constitutional Provisions

The Eleventh Amendment states:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State."

Statement of Facts

Petitioner's complaint indicated that his suit was a "civil action to quiet title to those soils lying between the high water lines on the right and left banks of those streams within the Willamette Basin draining into the Willamette River." (¶ 1). According to the complaint, those lands had been unlawfully taken by way of Or. Rev. Stat. 390.310, which established the "Willamette River Greenway" and thus "deprive[d] citizens of the United States of the right to pass the fee simple in lands to heirs or assigns in accordance with the Supreme Law of the Land." (¶ 2). For his relief, Petitioner prayed "that this Court declare ORS 390.310 Willamette River Greenway unconstitutional."

Basis for Jurisdiction in the District Court

Jurisdiction was proper pursuant to 28 U.S.C. § 1331.

Reasons for Allowing the Writ

Petitioner's suit was dismissed based on the District Court's interpretation of the Eleventh Amendment. There are two reasons why the Eleventh Amendment does not require dismissal.

1) Petitioner was not prosecuting a suit against "another State"

The Eleventh Amendment forbids a suit against "one of the United States by Citizens of another State." Traditionally, based on Hans v. Louisiana, 134 U.S. 1 (1890), this Court has interpreted those words to prevent suit against any state, including one's own state. However, it is time to overrule the Hans holding.

To state the obvious, Hans ignores the plain language of the Amendment. The amendment is very specific in referring to suits against another state. It nowhere refers to suits against one's home state. That 100 years have passed without the

overruling of Hans should not make a difference: Indeed, that 100 years of bad law have taken place should only hasten Hans's demise.

This position is amply supported by the dissenting opinion in Welch v. Texas Dept. of Highways and Public Transp., 483 U.S. 468 (1987). In that dissent, four Justices of this Court note not only that the language of the Eleventh Amendment nowhere bars a suit against one's own state, but also that the historical record upon which Hans and the Welch plurality based their decision was faulty. The dissent states:

> "The Court . . . chooses to ignore the clear meaning of the Constitution text based on speculation that the intentions of a few of the Framers and Ratifiers might have been otherwise. The evidence available reveals that the views of Madison and Hamilton on the issue are at best ambiguous, . . . and that Marshall's understanding runs directly counter to the Court's position. Thus, the Eleventh Amendment only bars a federal suit initiated by citizens of another State. 483 U.S. at 510.

Therefore, because Petitioner was not bringing an action against "another State," the Eleventh Amendment is inapplicable and the dismissal of his suit must be reversed.

2) Petitioner was not bringing a suit "against" a state

Whether or not this Court is prepared to overrule Hans, there is a second reason for reversing the dismissal of Petitioner's suit. The Eleventh Amendment bars only an action "against" a state. But Petitioner was not bringing an action "against" anyone.

The sole relief requested by Petitioner was a declaration that a certain Oregon statute was unconstitutional. He was not asking for money, for an injunction, or for a transfer of title to land. In no sense, therefore, was his suit brought "against" the State of Oregon.

Nor is Petitioner aware of any decision by this Court indicating that a suit

to have a statute declared unconstitutional, without more, is a suit barred by the Eleventh Amendment. Past cases, for instance, Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99 (1984), and Cory v. White, 457 U.S. 85, 90-91 (1982) are factually distinguishable.

Therefore, for this second reason, the Eleventh Amendment is not a bar to Petitioner's action, and reversal of the dismissal is proper.

Norman R. Evonuk

Norman R. Evonuk
Petitioner pro se

Appendix

On November 26, 1990, the United States Court of Appeals for the Ninth Circuit entered an opinion and judgment in the case of Norman R. Evonuk v. The State of Oregon, No. 90-35183, stating:

> "Norman Evonuk appeals pro se the district court's dismissal of his action to quiet title to land abutting the Willamette River. He contends the district court erred by determining that his action was barred by sovereign immunity. We affirm.
>
> "BACKGROUND
>
> "Evonuk filed a pro se complaint on behalf of 'himself, his friends and neighbors' against the state seeking to 'quiet title to certain areas along the banks of the Willamette River. He also sought a declaratory judgment that Oregon Revised Statute ('O.R.S.') 390.310, establishing the Willamette River Greenway, is unconstitutional because it 'deprives citizens of the United States of the right to pass the fee simple in lands to heirs or assigns in accordance with the Supreme Law of the Land."[1]

"1/ Evonuk claims that he (1) holds legal title to a record deed which passed title from the State of Oregon to his father as owner of Willamette River Bed Land in T17S, R4W, Sec. 24

"The State moved to dismiss the complaint for lack of subject matter jurisdiction under the Eleventh Amendment. The court adopted the findings and recommendation of Magistrate Hogan and dismissed the action.

"ANAYLYSIS

"A. Standard of Review

"Whether a state is immune from suit under the Eleventh Amendment is a question of law and is reviewed de novo. See BV Engineering v. Univ. of Cal., Los Angeles, 858 F.2d 1394, 1395 (9th Cir. 1988) (citing Charley's Taxi Radio Dispatch Corp. v. SIDA, 810 F.2d 869, 873 & n.2 (9th Cir. 1987)).

"B. Sovereign Immunity

"Evonuk appears to contend that the district court erred by dismissing his complaint on sovereign immunity grounds.[2/] This contention lacks merit.

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according to his father's last will and testament; (2) is owner in trust of a parcel of land bounded, on the west by Gate Creek and on the south by the McKenzie River which 'is above the navigable reaches;' (3) is personal owner of the land underlying the Coast Fork.

"2/ In response to a question asking whether the district court was wrong in dismissing the complaint, Evonuk responded in his pro se informal opening brief:

"The Eleventh Amendment 'denies to the citizens the right to resort to a Federal court to compel or restrain state action. . .' Worcester County Trust Co. v. Riley, 302 U.S. 292, 297 (1937). The Supreme Court has held that the Eleventh Amendment 'bars a citizen from bringing suit against his own state even though the express terms to the Amendment refer only to suits by citizens of another State.' Welch v. Dept. of Highways and Public Transportation, 483 U.S. 468, 472 (1987)(plurality)(citing Hans v. Louisiana, 134 U.S. 1, 10 (1890)); BV Engineering v. Univ. of Cal., Los Angeles, 858 F.2d at 1395). The bar extends to any suit regardless of the relief sought. See Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99 (1984); Cory v. White, 457 U.S. 85, 90-91 (1982).

"There are only three exceptions to the sovereign immunity rule. We may find waiver of immunity only 'where (1) the state expressly consents' (2) a statute or constitution so provides; or (3) Congress clearly intended to condition the state's

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'Far be it for me to judge. The District Court had to do what it did according to the Local Rules and the Federal Rules and Procedure in which I, as Appellant, am outside of my field of expertise. A correct answer would have to agree with how the Supreme Court of the United States itself would rule.'

participation in a program or activity on the state's waiver of immunity.' BV Engineering v. Univ. of Cal., Los Angeles, 858 F.2d at 1396 (quoting Collins v. Alaska, 823 F.2d 329, 337 (9th Cir. 1987)).

"It appears that this court is without subject matter jurisdiction for several reasons.

"First, Evonuk named the State of Oregon as the sole defendant. He did not allege that any state official acted in his individual capacity to violate any entitlement under the U.S. Constitution. He attempts to sue his own state in violation of the Eleventh Amendment. See Welch, 493 U.S. at 472.

"Second, the state has not expressly consented to this suit. A review of the relevant sections of the Oregon Revised Statutes and Oregon's constitution indicates that the state has not otherwise provided that it will allow itself to be sued in federal court with regard to the type of action brought by Evonuk. See Or. Const. of 1857; Or. Rev. Stat. §§ 271.005 to 275.370; 390.310 to 390. 460. See also BV Engineering v. Univ. of Cal., Los Angeles, 858 F.2d at 1396; Collins v. Alaska, 823 F.2d at 331-32. Cf. Hay v. Bruno, 394 F. Supp 286 (D. Or. 1972)(finding federal court jurisdiction to uphold Or. Rev. Stat. §§ 390.610 and 390.640 as constitutional because whether the state court 'worked an unpredictable change in state law' by applying common law principles of real property when it

held that the state had acquired a recreational easement under the doctrine of 'custom' presented an 'inevitabl[e] federal question'). There is no indication by Congress that it intended to create a cause of action for damages against Oregon for its activities pertaining to the Willamette River or conditioned Oregon's activities pertaining to the Willamette River on the state's waiver of immunity. BV Engineering at 1396; Collins at 331-32. Dismissal was proper.

"AFFIRMED."

On December 27, 1989, the United States District Court for the District of Oregon entered an Order in the case of Norman R. Evonuk v. The State of Oregon, No. 89-6330-E, stating:

"Magistrate Hogan filed his Findings and Recommendation on November 29, 1989. The matter is now before me pursuant to 28 U.S.C. Section 636(b)(1)(B) and Fed. R. Civ. P. 72(b). When a party objects to any portion of the Magistrate's Findings and Recommendation, the district court must make a de novo determination of that portion of the Magistrate's report. 28 U.S.C. Section 636(b)(1)(C); McDonnell Douglas Corp. v. Commodore Business Machines, 455 U.S. 920 (1982).

"Defendant has timely filed objec-

tions. I have, therefore, given the file of this case a de novo review. I adopt the Magistrate's Findings and Recommendation that defendant's motion to dismiss (#4) should be granted."

On November 29, 1989, the United States District Court for the District of Oregon entered its Findings and Recommendation in the case of Norman R. Evonuk v. The State of Oregon, No. 89-6330-E, stating:

> "Plaintiff filed this action against the state of Oregon seeking 'quiet title' to certain areas along the banks of the Willamette River and to obtain a declaratory judgment that ORS 390.310, establishing the Willamette River Greenway, is unconstitutional.
>
> "Defendant now moves to dismiss (#4) for lack of jurisdiction.
>
> "A citizen of a state cannot sue a state or state agency unless the state has 'unequivocally expressed' a consent to be sued. Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984). The Eleventh Amendment otherwise bars any such action regardless of the nature of the relief sought. Pennhurst, supra.
>
> "Plaintiff's complaint is against the state of Oregon. Defendant's motion to dismiss (#4) should be allowed and this proceeding dismissed."